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ABSTRACT

The First Amendment rights of students at public universities and colleges are well established by federal and state courts. Where a publication has been created as a forum for student expression, college authorities may not exercise anything but advisory control over editorial decisions of student editors. On-line student newspapers and literary magazines would seem to fall within the broad view of forms of expression granted these free press rights by the courts. Hence, the growing number of on-line student publications should be afforded the same First Amendment rights as their ink-and-paper forerunners. Universities adopting a hands-on attitude, despite consistent rulings by the courts granting editorial control to student editors, could find themselves being held liable for defamatory and privacy-invading statements made in those publications, while colleges that abide by the courts' rulings should be immune from such liability. However, Congress has muddied the First Amendment stream by treating the Internet--at least for the purposes of controlling obscenity and indecent language--as a medium to be regulated by the Federal Communications Commission. It may be that public universities will be forced to oversee and punish students for violations of the Communication Decency Act. That means that student editors could find themselves able to publish certain materials in print but not on-line. It can be argued that the rationales for allowing greater governmental restriction of broadcast media do not apply to on-line student publications. (Contains 121 references.) (TB)

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ON-LINE STUDENT PUBLICATIONS: DO STUDENT EDITORS AT PUBLIC UNIVERSITIES SHED THEIR FIRST AMENDMENT RIGHTS IN CYBERSPACE?

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ON-LINE STUDENT PUBLICATIONS:
DO STUDENT EDITORS AT PUBLIC UNIVERSITIES
SHED THEIR FIRST AMENDMENT RIGHTS IN CYBERSPACE?

Student editors at Northwestern Michigan College were preparing to place their newspaper and literary magazine on the public school's World Wide Web page in spring 1995 when college officials halted the plan. The President's Council, which at that time was raising money for the school's programs, felt that a partially nude photograph in the literary magazine would cause too much controversy.[1] Administrators later relented, and policies for making the publications available through the college's World Wide Web[2] home page were approved by the college president in December 1995.[3] Under the policies, school officials agreed that access for students, faculty and staff to the college's "electronic educational resources" would be "conducted with freedom from censorship" consistent with the First Amendment.[4]

The situation at Northwestern Michigan College is an example of a restriction placed on an electronic publication that would not have been permissible for its print counterpart. The issue of First Amendment protections for electronic versions of student publications[5] is likely to become more pressing as more student journalists find their way onto the Internet. Student editors have proven more receptive than their older, professional counterparts to publishing electronically.[6] More than 135 college newspapers, for example, already are on-line.[7] And

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[1]Student Press Law Center, *Michigan School Outlines New Cyberspace Policy*, SPLC Reports, Fall 1995, at 13.

[2]The World Wide Web allows the user to click on highlighted words or other data and be connected to additional files or documents related to the highlighted word. *See* E. Krol, The Whole Internet: User's Guide & Catalogue (1992).

[3]*Electronic Publication Access* and *Electronic Publication Access Procedures*, Northwestern Michigan College Policies and Procedures Manual, December 27, 1995.

[4]*Id.*

[5]In addition to the text of stories, some on-line student newspapers are incorporating color photos, advertising, and video and sound.

[6]George Garneau, *Campus Press Races Online: College Papers Move Quickly onto the Web, Ahead of Many Mainstream Newspapers*, Editor & Publisher, April 22, 1995, at 72.

[7]See http://www.newslink.org for a list of campus daily and weekly newspapers.

in what some analysts believe may be a move foretelling the future for all newspapers, Temple University's *The Temple News* in early March 1996 began "phasing out the paper" in its newspaper, changing its print version from a daily to a weekly in favor of a Tuesday through Friday on-line version.[8]

Student editors, however, are finding that "putting their publications on-line increases readership but also creates new problems with administrative censorship."[9] Mike Hiestand, an attorney for the Student Press Law Center, said the center has received telephone calls from colleges "asking about proposed policies for on-line student media that would restrict content -- particularly advertising, for some reason -- not restricted in a print version."[10] He said that while the policies were still in just the "talking stage," he expects that to "change all too quickly."

The big question is: Once words are converted from newsprint to digital format, does their First Amendment status change?[11] The purpose of this paper is to examine a narrower question: Do First Amendment protections granted to student publications at public colleges and universities apply to their on-line counterparts?

The paper will address that question in four sections. Part I will examine the federal and state court decisions establishing First Amendment protections for student print publications and apply these to on-line student publications. Part II will examine Federal Communications Commission rulings and court decisions affecting the rights of student broadcasters and apply these to student on-line publications. Part III will explore public university liability for libel and privacy invasion by the student press, two court decisions regarding on-line service liability for potential libel, and the implications of these decisions for universities controlling the content of on-line student publications. Part IV will review several rationales for extending First Amendment protections to all cyberspace publications.

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[8]Jane M. Von Bergen, *Phasing out the Paper at Student Newspaper*, The Philadelphia Inquirer, March 2, 1996, at D1.

[9]Student Press Law Center, *Traveling the Information Superhighway*, SPLC Reports, Spring 1995, at 20.

[10]Telephone Interview with Mike Hiestand, attorney for Student Press Law Center (Feb. 26, 1996).

[11]Walt Potter, *Free Speech on the Infobahn*, Presstime, July/August 1994, at 66.

This paper concludes that on-line student publications at public universities and colleges are entitled to the same First Amendment protections afforded to their print forerunners. School officials should be allowed to censor only to meet federal law regarding obscenity and indecency on the Internet.[12] Exercising editorial control over all the content of these on-line publications is not permissible, and, in fact, such control would seem to place universities at a greater risk of assuming liability for defamatory statements made in those publications.

I. FIRST AMENDMENT GUARANTEES EXTENDED TO THE PUBLIC UNIVERSITY STUDENT PRESS

Even though the U.S. Supreme Court has not ruled directly on the First Amendment protections of school-sponsored student publications at public universities and colleges, some 60 federal and state court decisions[13] have dealt with the struggle between students and administrators over matters involving freedom of speech and expression at public institutions of higher education.[14] The decisions have been nearly unanimous that the student publication of a state-supported university is entitled to the First Amendment protections afforded the commercial press, including freedom of expression for the editors.[15] Courts specifically have declared that administrators may not suspend an editor for publishing controversial articles,[16] suppress objectionable material from publication,[17] withdraw or reduce financial support because of the newspaper's offensive content,[18] or regulate content to assure the

[12]Telecommunications Act of 1996, Pub. L. No. 104-104 (1996).

[13] Media Law Committee, College Media Advisers, First Amendment Danger Signals/Tips/Resources for Advisers of Student Publications 8 (revised May 1992).

[14]Student Press Law Center, Law of the Student Press (2d ed. 1994).

[15]*Id.*

[16]Trujillo v. Love, 322 F. Supp. 1266 (Colo. 1971).

[17]Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1 Media L. Rep. (BNA) 1949 (5th Cir. 1976), *cert. denied*, 430 U.S. 982, 95 S.Ct. 1678 (1977).

[18]Stanley v. Magrath, 719 F.2d 279, 9 Media L. Rep. (BNA) 2352 (8th Cir. 1983).

compliance of printed material with "responsible freedom of the press."[19] However, none stated the First Amendment rights of students as succinctly as Louisiana Appeals Court Judge Jim Garrison's two-sentence concurrence in *Milliner v. Turner*: "Even college students may speak, write and publish freely."[20]

In 1972 and 1973, two U.S. Supreme Court decisions indicated the importance the Court placed on First Amendment protections for college students.[21] In *Healy v. James*, the Court unanimously concluded that the First Amendment applies fully to the states and that "state colleges and universities are not enclaves immune from [its] sweep. . . ."[22] In *Healy*, the president of a Connecticut public college refused to recognize a radical student group as an official student organization, which would have entitled the group to announce its activities in the campus newspaper and post notices on the college bulletin boards. The students argued that the denial violated their First Amendment rights.

The Court sided with the students, noting that "the college classroom and its surrounding environs is peculiarly the 'marketplace of ideas.' "[23] Its own precedents, the Court said, "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[24]

A year later, in *Papish v. Board of Curators of the University of Missouri*, the Court applied similar reasoning to a case involving censorship of a student journalist distributing an "underground" newspaper on a public college campus.[25] The newspaper contained two features that the university deemed "indecent." The front page included a reprint of a political

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[19]Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

[20]436 So.2d 1300 (La. App. 1983). Judge Garrison's first sentence read: "I concur."

[21]Student Press Law Center, *supra* note 14, at 52.

[22]408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972).

[23]408 U.S. at 180.

[24]*Id.*

[25]410 U.S. 667 (per curiam), *reh'g denied*, 411 U.S. 960 (1973).

cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice; and a reprint of an article concerning the acquittal of a New York man on charges of assault and battery was headlined "Motherfucker Acquitted." The man belonged to the group called "Up Against the Wall, Motherfucker."

Barbara Papish, a graduate journalism student at the University of Missouri, was expelled from school for distributing the newspaper in the heart of campus. In reversing a lower court ruling and ordering Papish reinstated, the Court said, "We think *Healy* makes it clear that the mere dissemination of ideas -- no matter how offensive to good taste -- on a state university campus may not be shut off in the name alone of 'conventions of decency.' "[26] The Court also noted that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[27]

However, the case that "focused national attention" on the courts' attitudes toward the student press, *Dickey v. Alabama State Bd. of Education*,[28] had come five years earlier.[29] Gary Dickey, editor of the student newspaper at Troy State University, was suspended from the school for "insubordination" after he printed the word "Censored" in place of an editorial he was ordered not to run by his adviser and the college president. Dickey had wanted to publish an editorial critical of the governor and state legislature; however, the college president had invoked a rule prohibiting editorials in the newspaper criticizing those officials. Dickey refused to run an editorial titled "Raising Dogs in North Carolina," which his adviser had provided as a substitute for Dickey's. In ordering Dickey reinstated as a student, a U.S. district court said:

> It is basic in our law in this country that the privilege to communicate concerning a matter of public interest is embraced in the First Amendment right relating to freedom of speech and is constitutionally protected against infringement by state officials. Boards of education, presidents of colleges,

[26] *Id.* at 670.

[27] *Id.* at 671.

[28] 273 F. Supp. 613 (M.D. Ala. 1967).

[29] Louis Ingelhart, Freedom for the College Student Press 36 (1985).

> and faculty advisers are not excepted from the rule that protects students against unreasonable rules and regulations.
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> . . . A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution. State school officials cannot infringe on their students' right of free and unrestricted expression as guaranteed by the Constitution of the United States where the exercise of such right does not materially and substantially interfere with requirements of appropriate discipline in the operation of the school.[30]

The court held that the rule invoked against Dickey had nothing to do with maintaining order and discipline among the students. Furthermore, the court said, once college administrators elected to form a student newspaper, they couldn't suspend or expel Dickey as a student for his conduct as a journalist without violating his First Amendment rights.

Two years later, the U.S. District Court of Massachusetts used similar reasoning when it said administrators could not require prior review of articles by an advisory board, and that officials could not censor expression they did not like.[31] In *Antonelli v. Hammond,* the court said:

> We are well beyond the belief that any manner of state regulation is permissible simply because it involves an activity which is a part of the university structure and is financed with funds controlled by the administration. The *state is not necessarily the unrestrained master of what it creates and fosters.* Thus in cases concerning school-supported publications or the use of school facilities, the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process.[32]

In *Bazaar v. Fortune,* the Fifth Circuit Court of Appeals enunciated what are now the well-established rules concerning censorship of the college press.[33] The court found (1) that

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[30]273 F. Supp. 613 at 617, 618 (*quoting* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[31]Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1969).

[32]*Id.* at 1337 (emphasis added).

[33]476 F.2d 570, *aff'd as modified en banc,*489 F.2d 225 (5th Cir. 1973), *cert. denied,* 414 U.S. 1135 (1973).

the fact that a state university provided funding, faculty or departmental advice, or campus facilities did not authorize university officials to censor the content of a student publication; (2) that individual four-letter words were insufficient reason to censor; (3) that the state university could not be considered the same as a private publisher with absolute arbitrary power to control content; (4) that the university, as an arm of the state, could not make private publisher decisions about content; and (5) that the university could not be held liable for the content of student publications.[34]

However, courts have recognized a public college's interest in maintaining order and discipline necessary for the success of the educational process.[35] Not since the turbulent early 1970s, though, "has a court found material in a college student publication to justify a school's claim of material and substantial disruption of school activities."[36] Courts also have held that maintaining the order necessary for educational activities is the "only legitimate justification for censorship of student expression that is otherwise constitutionally protected."[37] Courts have ruled censorship is not justified even when the material might be considered obscene or offensive, is of poor quality, or might be libelous.

In *Antonelli v. Hammond*, for example, the federal district judge ruled that a school president could not withhold funding from the student newspaper for reprinting an article by Eldridge Cleaver that included "four-letter words." The court said, "Obscenity in a campus newspaper is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined educational process."[38] College officials had not shown that the harm from such language in a college setting outweighed the danger of censorship to free expression, the court said.

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[34]Media Law Committee, *supra* note 13, at 9.

[35]Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970) (literature urged students to "stand up and fight" and to "assault the bastions of administrative tyranny"); Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971) (per curium) (hoax notices that classes would not meet two days before finals began); Jones v. State Board of Education, 407 F.2d 834 (6th Cir.), *cert. granted*, 396 U.S. 817 (1969), *cert. dismissed*, 397 U.S. 31 (1970) (leaflets urging boycott of fall registration).

[36]Student Press Law Center, *supra* note 14, at 34.

[37]*Id.* at 52.

[38]308 F. Supp. at 1336.

> If anything, the contrary would seem to be true. The university setting of college-age students being exposed to a wide range of intellectual experience creates a relatively mature marketplace for the interchange of ideas so that the free speech clause of the First Amendment with its underlying assumption that there is positive social value in an open forum seems particularly appropriate.[39]

In *Bazaar v. Fortune,* University of Mississippi officials had tried to stop publication of a literary magazine because of "earthy language" in two short stories.[40] The objectionable portions consisted of "four-letter words" often referred to as obscenities, including one the Fifth Circuit Court of Appeals in a footnote described as "literally referring to an incestuous son but more commonly used as an abusive epithet."[41] The court, in noting that it was satisfied the stories "do not meet the standard of legal obscenity," said obscenity was not an automatic justification for a university to censor a student publication.[42] In ruling that the university did not have the authority to control the publication's content, the court said:

> The University here is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.
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> . . . Neither can a state university support a campus newspaper and then try to restrict arbitrarily what it may publish, even if only to require that material be submitted to a faculty board to determine whether it complies with "responsible freedom of the press."[43]

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[39] *Id.*

[40] 476 F.2d 570, 489 F.2d 225 (5th Cir. 1973), *cert. denied* 414 U.S. 1135 (1973).

[41] 476 F.2d at 576.

[42] *Id.* at 575.

[43] *Id.* at 575 (*citing* American Civil Liberties Union of Virginia v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970) (*quoting* Antonelli v. Hammond, 308 F. Supp. 1329 (Mass. 1970).

In dismissing the university's arguments of "taste" and "appropriateness," the court said:

> We feel that we are past the point in this country today where the mere use of any single word in a public arena can be immediately branded as so tasteless or inappropriate that its use is subject to unbridled censorship or restriction by government authority. The short stories involved in this case, as noted, contain the word which has historically been viewed as the "worst" obscenity. With regard to this very four-letter word, the Supreme Court has stated that: "While the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[44]

In *Schiff v. Williams*, the college's justification for punishing student editors was not based on obscenity, but on the quality of the newspaper.[45] The Florida Atlantic University president fired three editors of the student newspaper because of poor grammar and spelling, "vilification and rumor mongering," and editorials that had "degenerated into immature and unsophisticated diatribes which reflect most negatively on the overall quality of our student body."[46]

The Fifth Circuit Court of Appeals rejected the university's argument that since the editors were state employees, "their free speech could be restricted by their employers if this right was outweighed by a more significant governmental interest – in this case, the university's interest in a publication that maintained high standards of grammar and literary value so as to project a proper view of the university and its student body."[47]

The court said: "The right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances. . . . [T]he 'special circumstances' relied on by the university -- poor grammar, spelling and language expression --

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[44] *Id.* at 576 (*quoting* Cohen v. California, 403 U.S. 15, 25 (1971). .

[45] 519 F.2d 257 (5th Cir. 1975).

[46] *Id.* at 259.

[47] *Id.* at 260.

could embarrass, and perhaps bring some element of disrepute to the school; but, assuming the president's assessment was correct, these faults are clearly not the sort which could lead to significant disruption on the university campus or within its educational processes."[48]

In *Mazart v. State*, the New York Court of Claims held that a public university could not censor student copy prior to publication even to avoid libelous material.[49] The same reasoning was followed by the Louisiana Court of Appeals in *Milliner v. Turner*, in which the court said that even the possibility of libelous material did not outweigh the benefits of granting students their First Amendment freedoms.

> Words may be harsh by some standards, but taken in context of the university community and its own publication, and even though they come perilously close to libel in its purest sense, it is still better to err on the side of the First Amendment freedoms rather than to stifle the creativity and criticisms of a student publication meant to encourage the development of writing skills and student expression in a learning environment.[50]

Federal courts have also indicated that advertising decisions -- which ads to accept or reject -- are content decisions within the purview of student editors, not administrators or would-be advertisers. In *Mississippi Gay Alliance v. Goudelock*, for example, the Fifth Circuit Court of Appeals rejected a homosexual group's attempt to force the Mississippi State University student newspaper to publish the organization's advertisement because the editor's decision constituted exercise of editorial control.[51] The court noted that university officials could not have lawfully ordered the newspaper to publish the organization's advertisement.[52]

In *Sinn v. Daily Nebraskan*, the Eighth Circuit Court of Appeals also upheld a student newspaper's right to reject homosexual-related advertisements on the basis that the decision

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[48] *Id.* at 260, 261.

[49] 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981).

[50] 436 So.2d 1300, 1303 (La. App. 1983).

[51] 536 F.2d 1073, 1 Media L. Rep. (BNA) 1949 (5th Cir. 1976), *cert. denied*, 430 U.S. 982, 95 S.Ct. 1678 (1977).

[52] 1 Media L. Rep. (BNA) at 1950, 1951.

had been made by the student editor, not university officials.[53] The court agreed with the lower court that the *Daily Nebraskan* operated like a private newspaper in its content decision-making process. The district court had held:

> The campus newspaper of a state-supported university is entitled to the constitutional protections afforded the "press," including freedom of expression for the editors. Editors necessarily exercise subjective discretion in refusing or accepting proffered materials. The degree of discretion which editors utilize in rejecting advertisements is not distinguishable, under the First Amendment analysis, from that exercised over any other submitted matter.[54]

In *Lueth v. St. Clair County Community College*, a federal district judge ruled that a community college's prohibition of an advertisement for a Canadian nude dancing club in the student-run newspaper violated the editor's First Amendment rights.[55] A school official said the ad was banned because it was degrading to women, promoted underage drinking, and conflicted with the college's educational mission and values.[56] The court ruled that the ban was "not narrowly tailored" to serve those interests.[57] The court also held that without advertising guidelines in place, the college would be subjecting the newspaper to the "virtual unbridled regulatory authority" of school officials.[58]

As courts have recognized First Amendment protections for newspapers and a literary magazine, they have also indicated a willingness to extend protection to other types of student publications. In *Antonelli v. Hammond*, a U.S. district court said: "In the very creation of an

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[53] 829 F.2d 662 (8th Cir. 1987).

[54] Sinn v. Daily Nebraskan, 638 F.Supp. 143, 146, 12 Media L. Rep. (BNA) 2340, 2342.

[55] 732 F.Supp. 1410 (E.D. Mich. 1990).

[56] *Id.* at 1415.

[57] *Id.* at 1416.

[58] *Id.*

activity involving media of communication, the state regulates to some degree the form of expression fostered. But the creation of the form does not give birth also to the power to mold its substance."[59]

The U.S. District Court of Colorado relied in part on *Antonelli v. Hammond* two years later when it ruled in *Trujillo v. Love* that Southern Colorado State University officials could not require student editors to submit "controversial" material to their faculty adviser for prior approval.[60] The court said: "The state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not unjustified [sic] by an overriding state interest."[61]

In *Bazaar v. Fortune*, the Fifth Circuit Court of Appeals relied on *Antonelli v. Hammond* in rejecting the University of Mississippi's distinction between a newspaper and literary magazine. "We see no difference between this and other University publications which the University concedes, quite correctly in our opinion, that it cannot censor except within constitutional limitations. The literary magazine, Images, is certainly within the broad class of publications to which the broad rule enunciated in *Antonelli* was designed to apply."[62]

Courts have also indicated that the First Amendment protections extended to student editors are not diluted because non-students or off-campus readers come into contact with the student publication. In *Bazaar v. Fortune*, for example, the court rejected university officials' argument that they had the right to prevent activities they felt might lead to criticism of the school by outsiders. The Fifth Circuit Court of Appeals said:

> [W]e can only reiterate that speech cannot be stifled by the state merely because it would perhaps draw an adverse reaction from the majority of people, be they politicians or ordinary citizens, and newspapers. To come forth with such a rule would be to virtually read the First Amendment out of the Constitution and, thus, cost this nation one of its strongest tenets. It

[59] 308 F. Supp. at 1337.

[60] 322 F. Supp. 1266 (Colo. 1971).

[61] *Id.* at 1270.

[62] 476 F.2d 570 at 575.

> would be unthinkable to say that the University of Mississippi could censor and forbid publication of an article in its law school journal on the grounds that the article concerned some sensitive issue, such as forced busing or abortion, which, because of the resolution reached in the article, the University determined would create an overwhelmingly adverse reaction among members of the bar and the public. The First Amendment simply took the power to make such judgment out of the hands of the state.[63]

The court also noted that the objectionable words at issue were "not being forced on an unwilling audience through public display. The nature of the language is no longer really that unusual in current literature, films, and conversation -- especially among the young. The trend to its use, both in spoken and written arts, while not to be commended, certainly must be recognized." [64]

Nor was the viewing of objectionable material by non-students, including high school students, a factor in the U.S. Supreme Court's decision in *Papish.* Papish handed out the "underground" newspaper near the Memorial Arch, through which -- a lower court had noted -- "pass parents of students, guests of the University, students, including many persons under 18 years of age and high school students."[65]

It seems, then, that student editors are entitled to First Amendment protections regardless of who might read their publications. This has special significance for on-line student publications. Public college administrators might argue that an on-line student publication's ability to collapse time and space poses special problems that justify censorship. For example, a publication on the World Wide Web could transmit material -- including language or pictures deemed by school officials as obscene or vulgar -- off campus to non-students. However, courts have ruled that public universities are not justified in censoring student publications when the information is considered obscene or offensive, even when it might be viewed by non-students. Nor would the school be justified in censoring the on-line student publication to sidestep

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[63] *Id.* at 579.

[64] *Id.* at 580.

[65] Papish V. Board of Curators of the Univ. of Missouri, 331 F. Supp. 1321, 1325 (W.D. Mo. 1971).

criticism of the college or to avoid a public controversy – as Northwestern Michigan College attempted to do.

College officials also might argue that on-line student publications are not entitled to First Amendment freedoms. However, a student newspaper or literary magazine in cyberspace is simply another means of transmitting the publication to readers. As such, it can reasonably be expected to fall within the the courts' broad view of what is a student publication. Federal and state courts have clearly stated that once a public college has created a form of student expression, it cannot control the content, except to maintain the discipline and order necessary to ensure educational success.

II. FIRST AMENDMENT RIGHTS OF STUDENT BROADCASTERS AT PUBLIC COLLEGES

Under the Telecommunications Act of 1996,[66] Congress is treating the Internet -- at least for the purpose of regulating indecent and obscene material -- as a broadcast medium subject to Federal Communications Commission regulation. In essence, Congress appears to be applying broadcast indecency law to the Internet, but without the "safe harbor" hours for the Internet.[67] Therefore, the First Amendment rights of student broadcasters at public universities and colleges should be reviewed with an eye toward how the content of on-line student media

[66]President Clinton signed the Telecommunications Act into law on Feb. 8, 1996. A coalition led by the American Civil Liberties Union has since challenged a section of the law -- the Communications Decency Act -- which would criminalize the transmission of "indecent" material to minors over computer networks. On Feb. 15, a federal judge in Philadelphia issued a partial temporary restraining order prohibiting enforcement of the "indecency" provision of the CDA. He declined to enjoin, however, provisions dealing with "patently offensive" communications. A three-judge panel began meeting March 21 to evaluate the constitutional validity of the CDA and to consider a permanent injunction against its enforcement.

[67]The Communications Decency Act, Title V of the Telecommunications Act of 1996, punishes for the following: Whoever -- (1) in interstate or foreign communications knowingly -- (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunication facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity. . . .

might be controlled under this legal framework. While only one court case specifically addressing censorship of student broadcasters at public colleges could be found, an examination of FCC rulings involving student-run stations and of court decisions involving public stations owned by universities indicates that school officials have the right to control the content of student-run stations to enforce FCC regulations, but not to suppress messages they do not like.

The Student Press Law Center noted that one university conceded it had "virtually no power" to censor the content of student programming on a college radio station.[68] According to the SPLC account of the FCC investigation,[69] University of Southern California at Santa Barbara officials told the commission, "Under well established First Amendment legal principles, there is little that the university can do to control the content of student expression, whether in a campus newspaper or on campus radio stations."[70]

The FCC, as part of a crackdown on "indecent" broadcasts in the late 1980s, declared "indecent" a song that aired on KCSB-FM, a student-run station for whom USCB regents were the licensee. The FCC ultimately accepted the position by USCB officials that though the school had the right to control or discipline students for programming that violated specific FCC regulations, such as the ban on "indecent" language, it did not have the "right to control content that complied with FCC regulations but with which school officials simply disagreed or might find otherwise offensive."[71] In other decisions, the FCC has held public universities liable for the actions of student broadcasters, including the airing of "indecent" material.[72]

Many university-owned television and radio stations are not student-run stations, but rather public stations run by non-student employees serving as station managers or program directors.[73] A critical difference is that a student-run station is a forum for student

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[68] "KCSB-FM responds to FCC investigation," Student Press Law Center *Report*, Fall 1987, at 28.

[69] The FCC decision was not officially reported. The only available FCC documentation was the decision in which the commission declared indecent the song in question. *See* 2 F.C.C.2d 2703 (1987).

[70] Student Press Law Center, *supra* note 14, at 86.

[71] *Id.*

[72] Those cases will be discussed in Part III, which deals with university liability for student media.

expression, which would make it less susceptible to editorial control by school officials, while a public station run by non-student employees would be subject to the editorial control of the licensee.

This line of reasoning begins with *Muir v. Alabama Educational Television*, in which the Fifth Circuit dealt with the question of whether two state-owned public television stations -- one of which was owned and operated by the University of Houston -- could cancel the broadcast of a single, previously scheduled television program based on concerns about its political content.[74] In ruling that license holders of public stations have the right to control their programming, the court held that the First Amendment does not preclude the government from exercising editorial control over its own medium of expression. However, the court said the degree of control that can be exercised consistent with the First Amendment depends on the mission of the communicative activity being controlled.

The majority and dissenting opinions, both citing *Bazaar v. Fortune*,[75] acknowledged that "standard First Amendment doctrine condemns content control by governmental bodies where the government sponsors certain facilities through the use of which others are allowed to communicate and to exercise their own right of expression."[76] In his special concurrence,[77] Judge Rubin, citing *Bazaar* and *Dickey v. Alabama*,[78] noted, "If the state is conducting an activity that functions as a marketplace of ideas, the Constitution requires content neutrality. Thus, a state university may not override editorial freedom of student newspapers."[79] Or, as Judge Johnson phrased it in his

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[73]Student Press Law Center, *supra* note 14, at 87.

[74]688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

[75]476 F.2d 570, *aff'd as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

[76]*Id.* at 1043.

[77]In a 1989 case relying on *Muir*, the Eleventh Circuit explained that *Muir* was an en banc decision before 22 judges. Judge Hill's opinion was joined by nine judges, as well as another judge writing separately but concurring in the opinion -- for a total of 11 judges. Judge Rubin wrote a special concurrence that was joined by three judges. Under the principle that, absent a majority opinion, the narrowest concurring opinion is the holding of the case, Judge Rubin's opinion is the law of the circuit. *See* Schneider v. Indian River Com. College Foundation, 875 F.2d 1537, 1541 (11th Cir. 1989).

[78]273 F.Supp. 613 (M.D. Ala. 1967).

dissent, the Fifth Circuit Court of Appeals in deciding *Bazaar*, had "concentrated on the particulars of the alleged censorship decision in the context of the existing editorial format."[80] The Student Press Law Center concluded that for student-run stations, *Muir* "strongly implies that censorship of a student-run television station would be no more permissible than censorship of a student newspaper."[81]

In 1989, the Eleventh Circuit Court of Appeals agreed with the principle that the license holder has "sole programming discretion" if the medium is "not designed to function as a pure marketplace of ideas."[82] The case involved attempts by the president of Indian River Community College, a Florida public school, to control the news content of WQCS, a non-commercial educational station for which the college was the licensee. The plaintiffs -- the station manager and the program director -- contended that the president's attempts to censor the news violated their First Amendment rights.

Relying on *Muir v. Alabama*, the court concluded that the station was not intended to function as a marketplace of ideas,[83] and, therefore, the president's control over news programming at the station could not have curtailed the station employees' First Amendment rights. Nothing in the U.S. Constitution, said the court, gives employees the right to use the licensee's equipment for their own expression.

> The appellants, as employees of the station, cannot require the Trustees, as licensee, to air any particular view over the station. The Trustees have the broadcast license and thus sole programming discretion. It is the First Amendment rights of the Trustees as licensee that are being exercised by the operation of WQCS, not those of the appellants.[84]

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[79] 688 F.2d at 1050.

[80] *Id.* at 1058.

[81] Student Press Law Center, *supra* note 14, at 88.

[82] Schneider v. Indian River Com. College Foundation, 875 F.2d 1537, 1541 (11th Cir. 1989).

[83] It should be noted that the radio station was not run by students. Student interns assisted the paid staff, some of whom taught. Thus, according to the court's description, the radio station was not a forum for student expression entitled to the First Amendment protections alluded to by the Fifth Circuit in *Muir* and *Bazaar*.

[84] 875 F.2d at 1541.

In 1994, however, a federal district court in Washington followed the reasoning in *Schneider v. Indian River Community College Foundation*, but came to a different conclusion.[85] In *Aldrich v. Knab*,[86] the court found that the "campus radio station" at the University of Washington had violated its employees' First Amendment rights.[87] The case revolved around the station management's policy barring criticism of the University of Washington (the licensee) and university officials. The court held -- as the other courts had -- that the radio station was not a public forum, and, therefore, the licensee "enjoyed relatively broad discretion under the First Amendment to regulate speech at the station."[88] But, the court held, the station management could not do so "based solely on the content of the speech."[89] The court said the government may regulate speech in non-public forums "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[90]

The court ruled that the policy barring criticism -- but not support -- of the university and its officials was "content-based suppression of speech" and that "suppression of particular news stories because of their content constitutes the type of pure viewpoint discrimination prohibited by the First Amendment."[91] This case differed from *Schneider*, the court said, because "the plaintiffs have been allowed to use the defendants' equipment and license for expression of all news and public service announcements on topics that the volunteers consider to be of local interest, except those that might be critical of the station or University of Washington."[92]

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[85]The court specifically distinguished *Muir* as a programming rights case and said it did not apply, noting that the case at issue was not about KCMU's right to control its own programming. Instead, the court said it found *Schneider* to be more similar to the one before it.

[86]858 F.Supp. 1480 (W.D. Wash. 1994).

[87]*DJs still spinning after temporary terminations*, SPLC Report, Winter 1994-95, at 8, 13.

[88]858 F. Supp. at 1493.

[89]*Id.*

[90]858 F. Supp at 1493, 1494 (*quoting* Perry Educational Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 44, 74, L. Ed. 2d 794, 804, 103 S. Ct. 948, 954 (1983).

[91]858 F. Supp. at 1493.

Even though on-line student publications are not licensed like television or radio stations, these court opinions and FCC decisions have First Amendment implications for student-run media in cyberspace. Barring a court's rejection of the Communications Decency Act, student on-line publications will be subjected to federal law concerning indecency. Based on FCC rulings involving student-run stations, university officials apparently could be held responsible for obscenity and indecency violations on the Internet. University officials then could censor or punish students for violations of federal law regarding obscenity and indecency on the Internet. However, as with radio and television stations run by students, public school officials could not lawfully censor student expression simply because they did not like it.

III. PUBLIC UNIVERSITY LIABILITY FOR LIBEL AND PRIVACY INVASION BY STUDENT PRESS

A number of writers have concluded that because public universities are constitutionally prohibited from exercising editorial control over student-run newspapers, they should be immune from legal liability for defamatory or privacy-invading statements in those publications.[93] Those colleges that do attempt to control content, however, should be held liable. Court decisions involving libel cases against student newspapers support that contention. Meanwhile, FCC decisions and court rulings indicate that license holders of radio and television stations are responsible for the actions of those working at the stations. And two recent cases indicate that computer information services will be held responsible for libel committed on their networks if they attempt to control content.

In *Milliner v. Turner*, Southern University of New Orleans faculty members sued the student-run newspaper after it called them "racists" and "proven fools."[94] The Louisiana Court of Appeals ruled that the university was not liable because it did not have the authority

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[92] *Id.* at 1492.

[93] *See* Ruth Walden, *The University's Liability for Libel and Privacy Invasion by Student Press*, 65 Journalism Q. 702 (Fall 1988); Note, *Tort Liability of a University for Libelous Material in Student Publications*, 71 Mich. L. R. 1061 (1972); *Law of the Student Press* 159 (Student Press Law Center 1994).

[94] 436 So.2d 1300, 1303 (La. App. 1983).

to censor the newspaper. "We find the First Amendment . . . would bar [the university] from exercising anything but advisory control over the paper, therefore, exempting the university from any liability or responsibility."[95]

In *Mazart v. State*, the *Pipe Dream*, the student newspaper at the State University of New York at Binghamton, ran a letter to the editor identifying the two plaintiffs "as members of the gay community."[96] The New York Court of Claims found that the publication constituted libel per se, and that the editors "acted in a grossly irresponsible manner."[97] However, the court concluded:

> The court recognizes that the *Pipe Dream* and its staff may be incapable of compensating claimants for any damages flowing from the libel. But, in light of the University's eschewing control, editorial or otherwise, over the paper and the constitutionally imposed barriers to the exercise by the University of any editorial control over the newspaper, the court must reluctantly conclude that the relationship of the University and the *Pipe Dream* is not such as would warrant the imposition of vicarious liability on the State for defamatory material appearing in the student newspaper.[98]

In contrast, the FCC consistently has ruled that "licensees are ultimately responsible for their employees' violation of federal regulations."[99] In a case involving numerous complaints against the University of Pennsylvania student-run radio station, for example, the commission said it could think of no reason "why as a general matter noncommercial broadcasters should be insulated from the degree of control we expect of commercial licensees."[100]

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[95] *Id.*

[96] 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981).

[97] *Id.* at 604.

[98] *Id.* at 606.

[99] Student Press Law Center, *supra* note at 86.

[100] Trustees of the University of Penn., 69 F.C.C.2d 1394, 1420 (1978), *recon. denied*, 71 F.C.C.2d 416 (1979).

> We do not mean to imply that extensive delegation of authority by a licensee -- commercial or educational -- is in itself unworkable. Nor do we wish to discourage University licensees from operating student-run stations. We do emphasize, however, that a licensee, educational or otherwise, may not delegate and subdelegate authority over a broadcast facility and thereby insulate itself from the ultimate responsibility for the operation of the station.[101]

Courts have indicated recently that computer information services exercising control over content on their networks also will be held responsible for libel committed on those networks, while those that do not exercise editorial control will be immune from such liability. In *Cubby Inc. v. CompuServe Inc.*, a federal district court ruled that a computer service company was a mere distributor of information and could not be held responsible for defamatory statements made in news publications loaded into its computer library by an independent third party.[102] But in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*,the New York State Supreme Court in Nassau County ruled that Prodigy was a publisher subject to libel laws because the on-line service "exercised sufficient degree of editorial control" over the content of messages posted on its bulletin boards.[103] In October 1994, an unidentified Prodigy subscriber had posted to Money Talk several statements accusing the investment firm Stratton Oakmont Inc. of criminal misconduct. Stratton Oakmont filed a $200 million libel lawsuit against Prodigy.

The court, relying on *Cubby*, emphasized that computer bulletin boards should generally be regarded as distributors such as book stores and libraries, which may be liable for the defamatory statements of others only if they knew or had reason to know of the defamatory statements. The judge noted that Compuserve had no opportunity to review publications posted to its electronic forum prior to their uploading and exercised "little or no editorial control" over their content.[104] Prodigy, however, was not such a passive conduit because it advertised itself to the public and to its subscribers as controlling the content of the bulletin board messages. By using technology and board leaders to delete

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[101] 69 F.C.C.2d at 1420.

[102] 776 F.Supp. 135 (S.D.N.Y. 1991).

[103] 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995).

[104] *Id.* at 1797.

bulletin board messages on the basis of offensiveness and "bad taste," Prodigy was making editorial content decisions similar to those made at newspapers. With that editorial control, the court said, comes increased liability.[105]

As noted earlier, assuming that the Communications Decency Act is not overturned by the courts, public universities may have no choice but to exercise control over on-line student publications in order to satisfy federal law regarding obscenity or indecent language on the Internet. However, as also noted, on-line student publications are not licensed by the FCC, and, therefore, universities would have no obligation to control other content in these publications. Based on the cases discussed in this section, it can reasonably be assumed that public universities that insist on controlling all of the content of on-line students publications will be held responsible for defamatory or privacy-invading statements made in those publications. Universities that do not exercise such involved editorial control should be immune from such liability.

IV. RATIONALES FOR EXTENDING FIRST AMENDMENT PROTECTIONS TO CYBERSPACE PUBLICATIONS

The First Amendment provides the fundamental basis for the right to free speech and a free press.[106] However, different First Amendment standards have been applied to print and to broadcasting, with publishers enjoying broad protection and broadcasters enjoying limited protection. For example, licenses are required of broadcasters, but not of publishers. For more than 40 years, broadcasters were required to devote a "reasonable" amount of time to covering "controversial issues of public importance" in their service areas and to provide a "reasonable opportunity" for significant opposing views to be heard.[107] No such obligation can be placed on publishers.[108]

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[105] *Id.* at 1796.

[106] U.S. Const. amend I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[107] Red Lion Broadcasting Co., Inc. v FCC, 395 U.S. 367 (1969).

[108] *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, (1974).

Under which First Amendment standard -- print or broadcast -- will cyberspace publications be treated? Courts have yet to decide the question. Congress, though, seems to be believe that in some respects (i.e., when dealing with obscene and indecent language) the Internet should be treated as a broadcast medium. The same fundamental First Amendment struggle has shaped the development of other "emerging" media -- including telephone, radio, broadcast television and cable television. At some point in their development, these media have sought to secure the broad First Amendment protections afforded to print publishers -- "the fullest freedom from regulation afforded by the First Amendment's proscriptions against governmental restrictions on free speech and freedom of the press."[109]

Justice Harry Blackmun observed in his concurrence in *City of Los Angeles v. Preferred Communications, Inc.* that when considering where a new communications medium fits under the First Amendment, courts should first determine whether the characteristics of the new technology "make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."[110] Does, then, "the existence of widespread computer-assisted communications -- cyberspace -- really raise novel legal issues" or does it raise the same issues, "only in a different medium"?[111] I. Trotter Hardy, a William and Mary College law professor, wrote, "[E]very new medium is fraught with complex new legal questions, the most fundamental among them being whether existing laws designed with other media in mind should be applied to the new medium as well."[112] He concluded that "some of the legal problems of cyberspace are indistinguishable from those that arise in real space. For the most part, these situations are characterized by the use of cyberspace as merely another means of transmission from individuals directly to other individuals."[113]

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[109]Phillip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 Fordham L. Rev. 1147 (1993).

[110]476 U.S. 488, 496 (1986).

[111]I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. Pitt. L. Rev. at 994 (1994).

[112]*Id.* at 996.

[113]*Id.* at 1053.

Hardy and other writers contend that computer publications -- if not all of cyberspace -- fit that description and should be accorded the same broad First Amendment protections granted to print publishers. They contend that the Supreme Court's two primary theories for government regulation of broadcast communications content -- the *NBC v. United States*[114] "scarcity" rationale and the *FCC v. Pacifica Foundation*[115] "intrusiveness" rationale -- do not appear to justify government regulation of computer publications.

The scarcity argument seems irrelevant since computer publications do not transmit over the public airwaves -- a precondition for the scarcity rationale to apply. Said Ronald Palenski: "A computer publisher does not send his information over a limited band or airwaves. Any individual or group can become a computer publisher by obtaining a computer or access to a computer and a modem and information to publish. The amount of these newsletters is not limited by technology."[116]

Nor would such publications seem to fit the U.S. Supreme Court's definition of "intrusive," according to these writers. Electronic information services, said Phillip H. Miller, seem to "fit at the least intrusive end of the spectrum alongside pay-per-view, dial-a-porn and other services that require an initiating act or invitation to trigger transmission into the home."[117]

Palenski contended that computer publications -- which under his definition are publications that exist solely on computer systems -- fall under the U.S. Supreme Court's broad view of what is the "press." To bolster his argument, he cited the Court's decision in *Lovell v. City of Griffin, Ga.*: "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion."[118]

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[114]319 U.S. 190 (1943).

[115]438 U.S. 726 (1978).

[116]Ronald Palenski, *Computer Publications and the First Amendment*, 25 Law/Technology, at 1, 16 (1992).

[117]Miller, *supra* note 110, at 1192.

[118]Lovell v. City of Griffin, Ga., 303 U.S. 444, 452 (1938).

Palenski contended that "computer publications satisfy the definition that the Court has given to what is to be covered by the First Amendment. By their very nature, computer publications are a vehicle by which information can be disseminated."[119] Also because of their similarity to newspapers, he argued, computer publications "should have the least amount of restriction necessary placed upon them."[120] "By deciding that computer publications will have the same rights under the First Amendment as newspapers, information will be dispersed throughout the nation in a more efficient manner so that the goal of the First Amendment will become reality."[121]

V. CONCLUSIONS

The First Amendment rights of students at public universities and colleges are well-established by federal and state courts. Where the publication has been created as a forum for student expression, college authorities may not exercise anything but advisory control over the editorial decisions of the student editors. On-line student newspapers and literary magazines would reasonably seem to fall within the broad view of forms of expression granted these free press rights by the courts. Hence, the growing number of on-line student publications should be afforded the same First Amendment rights as their ink-and-paper forerunners. Universities adopting a hands-on attitude, in spite of consistent rulings by the courts granting editorial control to the student editors, could find themselves being held liable for defamatory and privacy-invading statements made in those publications, while colleges that abide by the courts' rulings should be immune from such liability.

However, Congress has muddied the First Amendment stream by treating the Internet – at least for the purposes of controlling obscenity and indecent language -- as a medium to be regulated by the FCC. Barring the Communication Decency Act's being nullified by a court or repealed by Congress, public universities may be forced to oversee and punish students for violations of the CDA. This means that student editors may find themselves able to publish

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[119]Palenski, *supra* note 117, at 13.

[120]*Id.* at 14.

[121]*Id.*

certain material in print but not online. Court rulings, however, indicate that school officials would face tougher legal challenges if they choose to control all the content of on-line student publications. Exercising such editorial decisions also would seem to put the universities at a greater risk of assuming liability for tortious statements made in the publications. It would seem, then, to be in the best interests of public universities and colleges if these cyberspace publications were treated by Congress and the courts as having the same First Amendment protections print publications have enjoyed.

The rationales for allowing greater governmental restriction of broadcast media do not apply to on-line student newspapers and literary magazines. These publications are not transmitted over finite public airwaves, thereby overcoming the scarcity rationale used to limit the First Amendment rights of broadcasters, nor are these publications as "pervasive" as radio or broadcast television. They require the reader to take affirmative action akin to purchasing a newspaper or magazine, dialing a 900-number or subscribing to a cable-TV service.

Federal and state courts -- including the U.S. Supreme Court -- have placed a high degree of importance on protecting the free speech and free press rights of college students at public schools. To dilute those rights because newsprint has been converted to a digital format would seem to defeat the ideals expressed in dozens of court opinions and in the First Amendment itself. Indeed, considering the increasing popularity of on-line student publications, restricting the First Amendment rights of those editors would threaten the student press's role in fully and fairly informing a democratic society.